(13)

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 604.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION (an unincorporated association); DAVID DUBINSKY (as president of said association); FREDERICK F. UMHEY (as executive secretary of said association); and LOUIS LEVY (as a vice-president of said association),

Petitioners,

—against—

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO, and HONORABLE ELMER ROBINSON, as Judge of said Court,

Respondents.

REPLY BRIEF ON BEHALF OF PETITIONERS.

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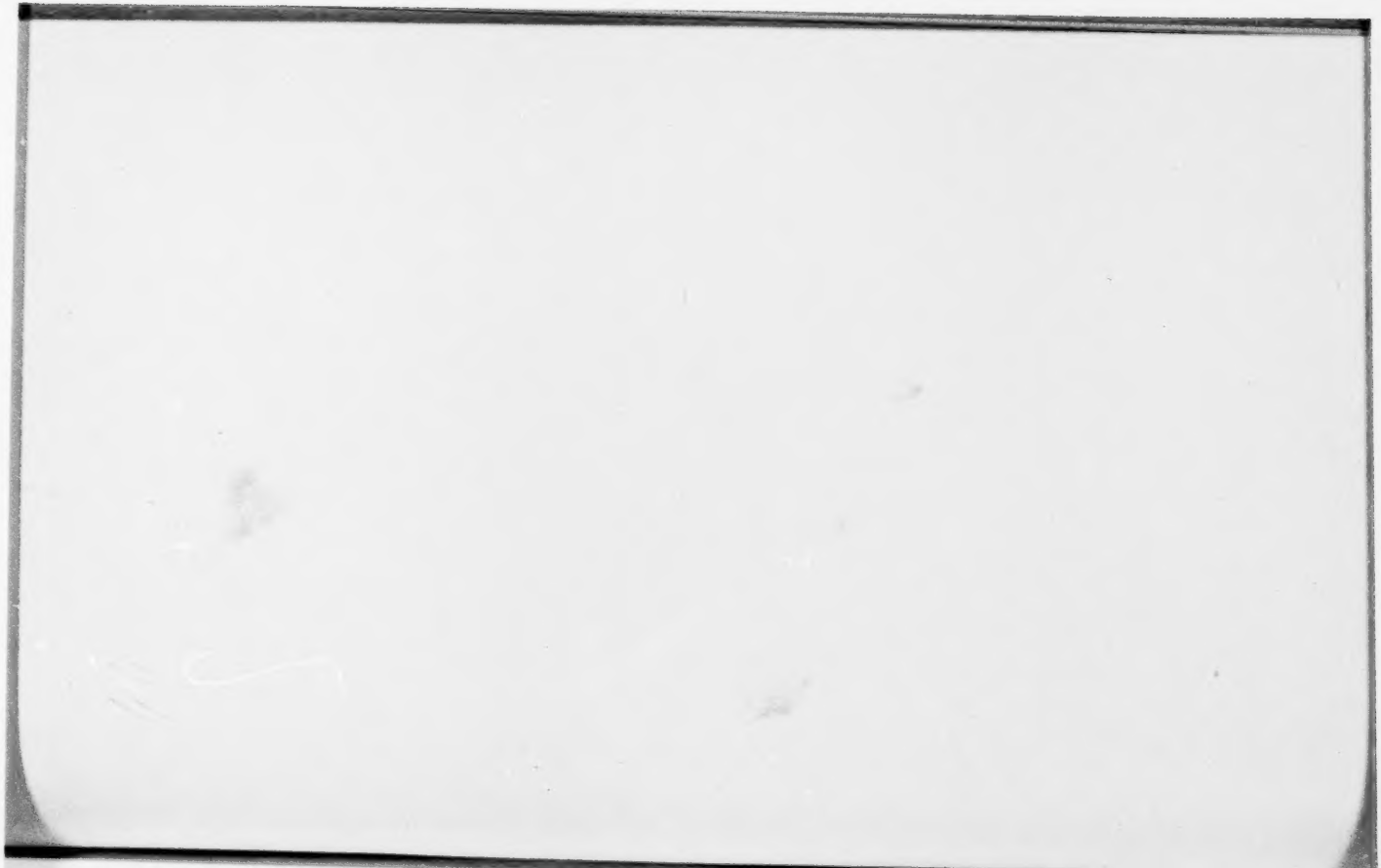

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REPLY BRIEF ON BEHALF OF PETITIONERS.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

As a reply to the brief submitted by the respondents herein, your petitioners set forth the following:

I.

The jurisdictional points were raised in the courts below.

Respondents state in their brief (p. 4 and p. 6), that petitioners did not state the jurisdictional point in the courts below.

At page 7 of our petition we quote fully from the petition for writ of prohibition in the District Court of Appeal which shows that we expressly raised the points that are discussed in our petition. At the same page we also quote from our motions in the Superior Court, which show that we there also raised the constitutional question.

II.

There were no findings of fact in the court below.

At page 4 of its brief, respondents state that we are asking this Court to accept as the factual basis of our petition a statement of facts "directly contrary to the findings of respondent court." As a matter of fact, no findings were prepared or signed by the court. Respondent neither quotes nor cites any such findings for the simple reason that no such findings exist.

Counsel persists in treating the opinion of the respondent court as constituting findings. This is contrary to California law. It is well settled that statements in an opinion do not constitute statements of fact binding upon appellate courts.

Re Lasker, 51 Cal. App. (2d) 120, 121-2, 124 Pac. (2d) 72 (1942);

DeCou v. *Howd*, 190 Cal. 741, 214 Pac. 444 (1923).

III.

The facts relied upon in our jurisdictional statement were uncontradicted facts.

As a matter of fact, the statements of fact referred to by us were based on uncontradicted evidence. If any

statement of fact made by us was contrary to the evidence, it would have been a simple matter for respondents to have quoted such evidence or cited the record. Throughout its brief respondents refer to so-called "facts" without any support in the record. It is to prevent this distortion that this court has enacted Rule 27, which reads in part as follows:

> "27. BRIEFS. (3) Whenever, in the brief of any party, a reference is made to the record, it must be accompanied by the record page number. When the reference is to a part of the evidence, the page citation must be specific and if the reference is to an exhibit both the page number at which the exhibit appears and at which it was offered in evidence must be indicated."

We anticipated that respondents would rely upon the general statement in the opinion of the Superior Court that the publication of the libels arose out of activities of the International in California. As there is no factual basis whatever for such intimation, we reviewed the uncontradicted facts at pages 31 to 37 of our petition and brief.

What is said there need not be repeated. It is sufficient to point out that this Court cannot be deprived of jurisdiction by the bare statement of so-called "facts" which are not only unsupported by the record but are contrary to the record.

IV.

The Supreme Court of the State of California and the District Court of Appeal for the State of California did not pass upon any of the issues in the case but merely exercised discretion to deny the petition without any hearing whatever on the merits.

Commencing at page 2 of its brief, respondents state that the Respondent Court's opinion was accepted by the District Court of Appeal and the Supreme Court of the State of California. There is nothing to support such statement. As a matter of fact, neither appellate court below purported to pass upon the merits of any issues in the case but merely exercised discretion to refuse to issue an alternative writ of prohibition. No opinion was written and although the court in each instance divided, there is nothing in the record at all to justify any statement or suggestion that either appellate court accepted any contention of either side with respect to any issue of law or fact involved.

Respondents also state (p. 13) that the California state courts have uniformly construed its state statutes as expressly granting to the state courts jurisdiction over foreign associations or foreign causes of action. Respondents cite no case and make no reference to the record to substantiate this statement.

If there were such a decision, it would have been a simple matter for respondents to cite the case. If there were contrary "facts" counsel could have referred to the evidence in the record by page number.

V.

The brief for respondents ignores our main contention as to the law and distorts this Court's decisions.

Respondents, inadvertently or deliberately, misconceive the point of the petition, erecting instead the proverbial straw man in order grandiloquently to destroy it.

Petitioner urged that defendant International, being a foreign labor union, was not subject to the jurisdiction of California upon a foreign tort that did not arise from business transacted by it in the state. The argument rested upon the fact that the International *is a labor union*, an unincorporated association, and that the decisions of this Court had held a state's process could not reach the foreign association.

In the face of our express statement to the contrary, respondents attempt to reduce our position to the argument that labor union *is to be treated like a corporation*. Thus, on page 16 of its brief, respondents state:

> "The major premise of petitioners' argument having no basis or foundation, the balance of the argument falls of its own weight. If corporations can be subjected to the jurisdiction of the State Courts upon foreign causes of action petitioners must concede that associations such as labor unions could likewise be subjected to the jurisdiction of the State Courts."

Yet, this distorted statement not only overlooks the petition itself but this Court's ruling in the case of *Flexner* v. *Farson*, 284 U. S. 289, 63 L. Ed. 250 (1918), and the later decisions interpreting the *Farson* principle,

which hold that the extrastate partnership is not amenable to the forum's service, even if a corporation may be.

Respondents do not even mention the Farson case.

Respondents do not even allude to our argument that a labor union could not be held by the serving jurisdiction upon a foreign tort under the recent cases interpreting the Farson doctrine. (See Brief in support of petition for writ, pp. 17, 18.)

Nor do respondents so much as address themselves to the proposition that the International could not be served under the California Statutes, such as Sections 388, 382 and 411, without violation of the principles above stated.

These propositions are apart and aside from any alleged claim that the cause of action arose out of activities of the International in California.

Respondents fail to meet the main proposition of the petition. They address themselves merely to the single argument that the process of a state may extend to a foreign corporation upon a foreign tort which does not arise from business transacted by the corporation in the state. Here, respondents argue that, since the foreign corporation is amenable, the foreign labor union must also be amenable.

In the first place, even assuming the validity of respondents' legal position, we have already pointed out that there is considerable question as to its application to a labor union. This Court has long recognized the difference in classification between the corporation conducted for profit and the labor union membership association. It would be to close one's eyes to the social facts and implications of the day to assume that the profit-taking corporation is the same before the law as the labor union. Although this Court might hold that the serving state could exercise jurisdiction over the foreign corporation for all of its acts, whether domestic or foreign, it could well reach the opposite conclusion as to a labor union as we pointed out in our main brief (pp. 14 *et seq.*).

In our case, actually the lower court reversed that process and held the labor union, although the *foreign corporation is not amenable to the California jurisdiction upon a foreign cause of action.*

We submit that the respondents' failure to distinguish between the foreign labor union and the foreign corporation cannot stand.

In the second place, respondents misconceive the law as to corporations and our position in regard to it. We pointed out that the situation as to service upon a foreign corporation fall into two groups: that in which a corporation *expressly* appointed an agent for service and that in which it did not. In the former situation, we argued the corporation was serviceable to the extent provided by the statute to which it had consented; in the latter it was not serviceable upon foreign causes not arising from domestic business because such serviceability violated due process.

We emphasized the fact that, if we applied the corporate analogy to our case at all, it fell into the first group, since the International *had not appointed* any agent for service. Upon the basis of an "implied" appointment, this Court has forbidden the exercise of jurisdiction in a case such as this.

Respondents' passing answer is that this rule applies only to service upon a public official, but, as we pointed out (Brief, pp. 22-24), the cases do not support such a distinction and the main authority relied upon by respondent (Bowers, Process & Service, p. 500) holds that "if there is a difference, it is so infinitesimal as to be well-nigh imperceptible".

Respondents thus completely fail to meet the issue in the decisions concerning foreign corporations, which hold that the state's process does not extend to the foreign tort that does not arise from business transacted in the state where an "implied appointment" exists.

Respondents even confuse the law as to *express* appointments. Here, of course, the question concerns the *construction* of the applicable state statute and the Court has ruled that in such a case as this the construction must be a *strict one*, and against any interpretation of the statute which would cover such foreign torts. Yet, respondents urge the very opposite rule of construction.

Although the respondents recognize that this Court has adopted the rule of strict construction of an express appointment (*Missouri Pacific Railroad Co.* v. *Clarendon Boat Oar Co., Inc.*, 250 U. S. 533, 66 L. Ed. 354; *Mitchell Furniture Company* v. *Selden-Breck Construction Co.*, 257 U. S. 213), they argue that this rule is not generally accepted. On page 10 of their brief, the respondents state: "Under such circumstances a few of the Federal District Courts have been inclined to follow the rule of the Missouri Pacific Railroad Company and the Mitchell Furniture Company cases of strictly construing these statutes so as not to encompass foreign causes of action, particularly where process was served upon a public official of the state. However, the great majority of the recent decisions of the Circuit Courts and the District Courts are inclined to follow the rule, almost universally applied by the State Courts, of liberal construction of the state statutes to include foreign causes of action." Thus, in the face of this Court's opposite rule, respondents urge a "liberal construction" of the state statutes.

It is clear that the strict rule of construction must be applied to the California statutes. That, indeed, was the rule applied in *Miner* v. *United Airlines Corporation, Inc.* (S. D. Cal. 1936), 16 Fed. Supp. 930, and *Fry* v. *Denver & R. G. R. Co.* (N. D. Cal. 1915), 226 Fed. 893, which held that the California statutes did not cover a foreign tort that did not arise from business transacted by the foreign corporation. Respondents ignore this decision because it expresses the rule of this Court.

Basing its argument upon a liberal construction of state statutes, respondents argue that the California statutes cover the present tort. In the first place, this interpretation violates the language of the statutes (Brief in support of petition for writ, p. 21). In the second place, the respondents ignore the cases (Id., p. 21). In the third place, the respondents erroneously assume that California has interpreted its statutes through the medium of the instant case. The California courts, of course, did no such thing. Denial of a writ of prohibition does not pass upon the merits of the case and even less upon the construction of statutes which may possibly be involved in it.

Each of respondents' cases involved interpretations by lower state and federal courts of an express appointment of an agent for service. This is true of *Trojan Engineering Corp.* v. *Green, M. T. P. Corp.* (Mass. 1936), 200 N. E. 117; *Southern Ry. Co.* v. *Parker*, 21 S. E. 2d 94 (1942). It is utterly immaterial to this case what construction was placed upon a different state statute by the court of that state.

Likewise, *Canadian Pacific R. R. Co.* v. *Sullivan*, 126 Fed. 2d 433, involved the construction of the Massachusetts Courts of its statute for service under an express appointment by a corporation. This, and the cases cited on pages 12 and 13 of respondents' brief, is predicated upon the indefensible assumption that the California Courts have heretofore ruled that an express appointment of an agent covers a foreign tort that does not arise from corporate business in the state.

Respondents' final argument once more returns to the situation regarding a partnership or association, and in this respect it quotes from the Restatement of the Law.

We are astounded at respondents' contention (p. 15) that the Restatement of the Law does not hold that jurisdiction "over a corporation or an association" may be extended only over foreign torts which arise from business transacted by the association or corporation in the state. The section speaks for itself. Indeed, respondents' own citation, *Western Mutual Fire Ins. Co.* v. *Lamson Bros. & Co.* (1941), 42 Fed. Supp. 1007 (Respondents' Brief, p. 17), holds in accordance with the Restatement of the Law that the partnership is liable only upon causes of action growing out of business transacted within the state. Holding that the partnership was to be distinguished from the corporation and that the former could not be charged with liability for a foreign cause, unless it arose from business transacted within the state, the court found in that case that the partnership was a suable entity, that it engaged in business in the state and that the cause of action arose from it. The language of the decision reads:

> "Under our system of government an individual citizen of a State is also a citizen of the United States and as such citizen of the United States he has a right, without interference on the part of any State, to transact business anywhere in the United States. For this reason a State, other than that in which he is a citizen, may not burden this right to do business in other States by making him amenable by substituted services to process under the laws of such other States on the ground that the privilege of doing business in such other State carries with it an obligation to be amenable to the courts of the State in which he is so doing business. See cases *infra*."
>
> "In the American Law Institute, Restatement of Conflict of Laws, the rule is stated as follows: 'Sec. 86. Partnerships or other Unincorporated Associations. (1) A partnership or other unincorporated as-

sociation, by doing business in a state in which the partnership or association is subject to suit in the firm name, subjects itself to the jurisdiction of the state as to causes of action arising out of the business there done'" (p. 1012).

In conclusion, we submit that the petition for certiorari should be granted.

Dated February 23rd, 1944.

Respectfully submitted,

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